UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al., Defendants.	05-CV-0329 GKF-SAJ **DEFENDANTS' REPLY IN SUPPORT OF MOTION TO COMPEL PLAINTIFFS' COMPLIANCE WITH THE COURT'S ORDER ON DATA PRODUCTION**

Defendants submit this joint reply in support of their Motion to Compel Plaintiffs' Compliance with the Court's Order on Data Production (Dkt. No. 1605), which asks the Court to enforce its January 5, 2007 Order compelling Plaintiffs to produce data (Dkt. No. 1016). Plaintiffs' response to Defendants' motion mistakenly focuses on expert opinion materials rather than raw data and faults Defendants' multiple attempts to meet and confer on this issue. Simultaneously with their response, Plaintiffs produced some (but not all) of the missing data and other information owed to Defendants. Plaintiffs' last-minute production of some of the known missing information neither disposes of the motion nor cures Defendants' prejudice. Because their prejudice is ongoing and immediate, Defendants will by separate motion request expedited consideration of their motion to compel compliance.

Defendants first moved to compel Plaintiffs' data in May 2006. (Dkt. No. 743.) After eight months of motion practice, the Court on January 5, 2007 held that Plaintiffs' "denial of the information to Defendants would deny vital information necessary to Defendants' defense." (Dkt. No. 1016 at 8.) In recognition of the critical nature of the information requested, the Court ordered Plaintiffs to produce the scientific data and information by February 1, 2007. As detailed in the opening brief, however, the next year was marked by continued exchanges and

extended meet-and-confer sessions in which Plaintiffs promised to produce information but then either delayed production for long periods or, as described below, never produced the information at all. (See Dkt. No. 1605 at 4-7.) After finding new indications that Plaintiffs had failed to comply with the January 2007 Order (see id. at 7-9, Dkt. No. 1565-15), Defendants moved this Court again to enforce compliance.

Following service of both Defendants' motion and Plaintiffs' response to that motion, on March 25 and April 4, 2008, Plaintiffs produced some of the previously identified missing data, productions that demonstrate Plaintiffs' failure to comply with the January 2007 Order. Not only have Plaintiffs erroneously represented to this Court that they have produced all outstanding data, they have violated the Court's Order of January 5, 2007 and Rule 37 by waiting until after they filed their response to this motion to produce some of the previously withheld existing data.

Defendants request that the Court intercede to address this conduct. Defendants urge the Court to compel Plaintiffs (1) to produce immediately all previously undisclosed scientific information and data and (2) to bar the use by experts and the use at trial of any information not produced within ten days of the Court's order or, as to new data, within ten days of the generation of data. Given the circumstances here and the need for repeated motion practice on this issue, Defendants also urge the Court to award Defendants their attorney's fees incurred in bringing this motion.

A. Plaintiffs Withheld Vast Amounts of Old Data Until After They Responded to the Instant Motion to Compel.

On March 25, 2008, the extended deadline for Plaintiffs' to respond to the present motion, Plaintiffs supplemented their data production in an express effort to moot the motion and to belatedly comply with the January 2007 Order. (See Dkt. No. 1652-2: Ltr. from L. Bullock to M. Bond.) Inasmuch as Plaintiffs' response relies primarily on this new production rather than

addressing in depth Defendants' arguments regarding Plaintiffs' dilatory DNA and bacteria production and willful avoidance of production (see Dkt. No. 1605 at 4-10), Defendants' reply will focus primarily on Plaintiffs' claim that their new production of information moots Defendants' motion.

As a threshold matter, even assuming for the sake of argument that Plaintiffs had now produced all of their withheld information (which, as discussed below, they have not), they cannot unilaterally moot Defendants' motion. Rule 37 mandates that "if the disclosure of requested discovery is provided after the motion was filed – the court must, after giving an opportunity to be heard, require the party ... whose conduct necessitated the motion, the party, or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees." Fed. R. Civ. P. 37(a)(5)(A). The Rule requires an award of expenses unless the district court specifically finds that an exception applies. Harolds Stores v. Dillard Dep't Stores, 82 F.3d 1533, 1555 (10th Cir. 1996). Hence, a party cannot moot a motion to compel by producing demanded materials after the motion is filed. E.g., Augustine v. Adams, 169 F.R.D. 664, 666 (D. Kan. 1996); see also McDonald v. HCA Health Servs. of Okla., Inc., 2006 U.S. Dist. LEXIS 89798, at *9-10 (W.D. Okla. Dec. 11, 2006) (awarding attorney's fees where portion of production made after motion to compel was filed).

Apart from Rule 37's direction regarding the effect of post-motion productions, Tenth Circuit courts have chastised plaintiffs for withholding information in situations like this:

> Cases such as this wherein defendants are sued for millions of dollars and are required to incur hundreds of thousands of dollars in defense costs deserve a higher degree of care than was employed by [plaintiff] and its Outside Counsel in this case. .... Counsels' duty to assure the production of documents to the adverse party is no less than the duty to prepare their client's case for trial. In the court's view, the responsibility to produce documents is underscored when a governmental agency sues a private citizen, as occurred here, while at the same time holding the primary evidence upon which the case will be tried.

Resolution Trust Corp. v. Williams, 162 F.R.D. 654, 660 (D. Kan. 1995). Here, too, the Court should underscore and reinforce Plaintiffs' responsibility to produce the primary evidence on which this case will be tried, evidence to which only they have access.

The materials Plaintiffs produced after Defendants filed their motion amply demonstrate that Plaintiffs have unjustifiably withheld data that they now acknowledge is subject to the January 2007 Order, sometimes for years. The accompanying Affidavit of Ms. Kristen Shults Carney summarizes the information produced on March 25, 2008 and details the dates of sampling, analysis, and validation of the data, showing multiple instances where Plaintiffs are only now producing data that Plaintiffs gathered years ago. (Ex. 1.) In light of this information, Defendants cannot credit Plaintiffs' counsels' repeated representations that "as new data has been developed, it has been produced." (See, e.g., Dkt. No. 1605-6 at 1: Sept. 19, 2007 Ltr. from L. Bullock to R. George.)

For example, Plaintiffs have only now produced field notebooks and synoptic river field sheets that are dated as early as 2006. (See Ex. 1 ¶ 3 and Ex. A to K. Carney Aff.) These types of notebooks and field sheets generally include information like field parameters, measurements, and observations as well as GIS location data. Such information puts Plaintiffs' sampling and testing data into context and is critical to Defendants' ability to use the data produced by Plaintiffs. The March 25, 2008 production also revealed that certain notes that Dr. Bert Fisher created in April and May 2007 – notes that Plaintiffs admit are subject to the January 2007 data Order – were not produced until the Court ordered the production of Plaintiffs' preliminary injunction experts' considered materials in February 2008. (See Dkt. No. 1656-2 at 2.) Plaintiffs improperly withheld all of these materials in violation of the January 2007 Order.

Plaintiffs have also just produced additional bacteria data collected, analyzed, and sent directly to their preliminary injunction expert Dr. Roger Olsen well before the preliminary injunction hearing, offering no explanation or justification for withholding the data. For example, in response to this motion, Plaintiffs produced at least twenty bacteria samples taken in early December 2007 and analyzed and returned to Dr. Olsen on December 21 or 26, 2007. (See Ex. 1 ¶ 3 and at 1-2 of Ex. A to Aff.; see also, e.g., Ex. 2: samples taken Dec. 4, analyzed Dec. 21, 2007, not produced until Mar. 25, 2008.) On January 15 and 18, 2008, Dr. Olsen received at least eleven more analyzed bacteria samples that were taken in December 2007 or January 2008, and at least five more on February 15 that were taken earlier in February 2008. (See Ex. 1: Ex. A to Aff. at 2-3.) None of these were provided to Defendants until after Defendants filed the instant motion. Aside from Plaintiffs' duties to produce information relative to the preliminary injunction proceedings, the January 2007 Order independently required Plaintiffs to produce this bacteria information to Defendants. The fact that Defendants experienced greater prejudice from Plaintiffs' withholding of this bacteria data because of the intervening preliminary injunction hearing merely highlights the need for this Court to act to enforce its existing Order.

Plaintiffs' new March 25, 2008 production also included information that Plaintiffs delayed for an exceedingly long time before validating and then failed to timely disclose to Defendants even after validation.[1] (Ex. 1 ¶ 4.) For example, Plaintiffs just produced data from at least 25 samples that Plaintiffs took in late summer 2007 but did not validate until February 18, 2008 and did not produce to Defendants until five weeks later, after the conclusion of the

[1] As explained in the opening brief, the January 5, 2007 Order gives Plaintiffs no right to withhold data on grounds that it has not been validated or QA/QC'd, or to withhold results until Plaintiffs found data that purportedly supports their positions. (See Dkt. No. 1605 at 4-5.) Defendants are entitled to all data gathered as soon as it is available.

hearing on Plaintiffs' motion for preliminary injunction. (See Ex. 1: Ex. A to Aff. at 4.) Plaintiffs also waited until March 25 to produce numerous hormone samples validated December 30, 2007 that were taken and analyzed in Fall 2007. (Id. at 4-5.)

Plaintiffs' recent production also belies their continued assertion that they have withheld analyzed data so that it could be validated or "QA/QC'd." To cite but a few examples:

1. Plaintiffs recently produced 15 samples taken and analyzed in March 2006 and another 50 samples taken and analyzed in August 2006, none of which were validated during the approximately two years they were withheld. (Id. at 6.)

2. The March 25 production included approximately 90,000 diatom count samples taken beginning in September 2006 through May 2007, none of which have been validated. (Id. at 7.)

3. Plaintiffs took 20 samples in January 2007 and analyzed them in February 2007 for metals, phosphorus, nitrogen, soluble salts, etc., but never validated them and failed to produce them for over a year. (Id. at 5.)

4. Plaintiffs took over 500 samples in April and May 2007 and analyzed them in the spring of 2007. The samples were never validated, yet Plaintiffs did not disclose them until March 25, 2008. (Id. at 5, 7.)

5. More than 200 additional samples produced on March 25, 2008 were actually taken and analyzed during the summer of 2007 but never validated. (Id. at 5-7.)

6. Also among the March 25, 2008 data were nearly 500 macroalgae samples taken in March – May 2007, none of which were validated. (Id. at 7.)

7. Nearly 80 benthic macroinvertebrate samples taken in April and June 2007 and analyzed in September 2007 were withheld until March 25, 2008, yet not validated. (Id.)

Rather than acknowledge the true character of their March 25, 2008 production, Plaintiffs represent to the Court that "[b]eginning on February 1, 2007, and continuing to the present, the State has produced the scientific testing results developed … as that data has completed the State's internal … QA/QC process." (Pls' Resp. at 2: Dkt. No. 1656.) As demonstrated above, this representation is incorrect.

Finally, the March 25 production also includes some "validated data reports" that Plaintiffs previously asserted did not exist. (Dkt. No. 1605-6 at 3: Sept. 19, 2007 Ltr. from L. Bullock to R. George.) The reports are of great importance because they reveal whether Plaintiffs themselves believe the subject data should be qualified for any reason. Plaintiffs have neither produced validated data reports for all produced data nor explained why some reports exist for only a subset of the produced data.

Plaintiffs' own production proves that they have substantially violated both Rule 37 and this Court's January 5, 2007 Order. Plaintiffs have not fulfilled their obligation to produce primary evidence critical to the defense of this case, and the Court should compel Plaintiffs to carry out that duty.

B. Plaintiffs Still Owe Scientific Information Under the January 2007 Order.

Plaintiffs are also incorrect in representing to the Court that they have "complied and produced all of the testing results as required by the Court" such that "[t]here is nothing to compel." (Pls.' Resp. at 1: Dkt. No. 1656.) To try to justify this assertion, Plaintiffs read the January 2007 Order narrowly to cover only "sampling results." (Dkt. No. 1656-2.)[2] To

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[2] As detailed in the motion, the Court actually directed Plaintiffs to turn over all "the requested data, testing, sampling, and results." (Dkt. No. 1016 at 8.) The Order at page nine specified that Plaintiffs' production must include:

1) For "each instance of sampling, monitoring or listing:"
   a) "date and location of sampling,"
   b) "name, address, and telephone number of each person involved in sampling,"
   c) "media or material sampled," and
   d) "all tests or laboratory analysis performed."
2) Copies of "all sampling, monitoring or testing" documents, which includes "laboratory results, assay reports, QA/QC documents, sampling protocols (unless prepared by an attorney), photographs, and site sketches."
3) Copies of "all documents relating to the scientific investigation of groundwater contamination," which includes "laboratory results, assay reports, QA/QC documents, sampling protocols (unless developed by an attorney), photographs, and site sketches."

conclude that Plaintiffs' averment is in error, however, the Court need look no further than Exhibit 1 to Plaintiffs' own response, the March 25, 2008 cover letter. Contrary to Plaintiffs' assertion that they have now produced everything, Plaintiffs' own letter states that the production merely "substantially completes the production of all of the other data required by this Court's January 5, 2007 Order," but also admits (1) that data from the USGS relating to IRW sampling remains outstanding, (2) that "several chain [of] custody forms ... need to be produced," and (3) that the production includes "most" of the missing photos of sampling events. (Id. at 1-2.) On Friday, April 4, 2008, Defendants received a supplemental production of some chain of custody forms and purportedly "the last of the photographs," all of which Plaintiffs acknowledge are subject to the January 5, 2007 Order. (Ex. 3: Apr. 3, 2008 Ltr. from L. Bullock to M. Bond.) Defendants are reviewing the April 4th production, and have not yet been able to determine whether other chain of custody forms remain outstanding.

The March 25 post-motion production contained no new DNA materials, nor does it appear that DNA materials were included in the April 4 production. Hence, apart from what Plaintiffs acknowledge they have yet to produce, Plaintiffs may also be withholding additional DNA data or related information subject to the January 5, 2007 Order, as detailed in Defendants' opening brief. (Dkt. No. 1605 at 3-9; see also Dkt. No. 1565-15.) Plaintiffs' post-motion cover letters also make no assurance that they have produced all information beyond "sampling results," including, for example, sampling protocols, data validation reports, GIS information, or correspondence with the labs related to the data or related to QA/QC processes. (See Dkt. No. 1656; see also Ex. 3.)

Plaintiffs' response also indicates that they do not believe the January 2007 Order governs data arising from Oklahoma state agencies. (Dkt. No. 1656 at 1, n.1: "[S]everal State

agencies independent of this litigation have sampling programs within the IRW. Data from this sampling has been produced separately though agency productions. The State will continue to update those productions consistent with the Federal Rules.") Plaintiffs have not made clear either in correspondence or in their submission to this Court whether they have in fact produced all such agency data. The Court's January 5 Order, however, creates no agency exception. All of Plaintiffs' scientific data and information is subject to the January 5, 2007 Order, and the Court should reject Plaintiffs' apparent attempt to create an agency exception to that mandate.

In sum, despite Plaintiffs' mistaken representations to the contrary, they did not complete their production of outstanding data by March 25, nor have they produced all known information subject to the January 2007 Order. Moreover, Plaintiffs' productions to date have focused almost entirely on the data that supports Plaintiffs' positions on various factual issues. Plaintiffs may also have generated additional undisclosed data, including data that supports Defendants' positions and undermines Plaintiffs' case, of which Defendants have no present knowledge and therefore cannot specifically inquire. Defendants respectfully submit that, given the history of Plaintiffs' production of data in this case, the Court should issue an additional Order compelling Plaintiffs' compliance with the January 2007 Order and indicating the consequences to Plaintiffs of any further failure to comply.

CONCLUSION

Defendants' need for Plaintiffs' data is even more urgent now than when the Court first ordered data production in January 2007. Plaintiffs' expert disclosures are due next month, and Defendants must have the "vital information necessary to Defendants' defense," as this Court has already ordered. (Dkt. No. 1016 at 8.) Defendants request that the Court compel Plaintiffs to disclose all scientific data and related information as required by the Order of January 5, 2007 within ten days of the date of the order on this motion or within ten days of the generation of

data, whichever is later. The Court should also order that Plaintiffs may not offer at trial, either as evidence or as expert reliance material, any previously undisclosed data or information that does not comply with this new Order. Finally, the Court should award appropriate attorneys fees as directed by Rule 37, and should direct the Defendants to submit their lists of fees and costs incurred in connection with this motion for in camera review.

Respectfully submitted,

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